

P-430/AR-95-1049

PROTECTIVE ORDER

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Tom Burton
Marshall Johnson
Dee Knaak
Don Storm

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Petition by United
Telephone Company of Minnesota Requesting
Adoption of An Alternative Regulation Plan

ISSUE DATE: December 19, 1995

DOCKET NO. P-430/AR-95-1049

PROTECTIVE ORDER

PROCEDURAL HISTORY

On October 10, 1995, United filed an alternative form of regulation (AFOR) plan pursuant to Minn. Stat. §§ 237.76 through 237.772 (1995), referred to in this proceeding as the Competition Statute.

On October 31, 1995, the Commission issued its NOTICE OF FILING, ORDER ESTABLISHING PROCEDURES, AND ORDER CONVENING SETTLEMENT CONFERENCE (Order) in this matter. The Order provided interested persons with 20 days to challenge the adequacy or completeness of the filing.

On November 17, 1995, United filed a Proposed Protective Order.

On November 20, 1995, AT&T filed a challenge to the completeness or adequacy of the filing.

On November 29 and 30, 1995, replies to AT&T comments were filed by the Minnesota Department of Public Service (the Department), the Residential Utilities and Small Business Division of the Office of the Attorney General (RUD-OAG), United, and MCI.

On December 1, 1995, MCI Communications, Inc. (MCI) filed its comments regarding the adequacy of United's filing.

On December 1, 1995, the Department filed comments regarding United's Proposed Protective Order. The Department recommended several amendments to the Company's proposed Order.

On December 4, 1995, AT&T filed an objection to United's Proposed Protective Order. AT&T urged the Commission to adopt a Protective Order that it submitted.

On December 11, 1995, United responded to the comments of the Department and AT&T regarding its Proposed Protective Order. The Company adopted the Revised Proposed

Protective Order submitted by Frontier Communications of Minnesota, Inc. (Frontier) on December 7, 1995 in a comparable docket, P-405/AR-95-1048.

On December 11, 1995, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

A. Scope of This Order

In a separate Order¹ issued contemporaneously with this PROTECTIVE ORDER, the Commission accepted United's initial filing as substantially complete and, therefore, did not suspend the proceeding and require the Company to provide additional information before determining the adequacy of the filing, as requested by AT&T in its initial comments.

In the current Order, the Commission resolves issues raised by AT&T and the Department regarding certain provisions in United's Proposed Protective Order and establishes the guidelines that will govern United's provision of confidential information in response to the parties' information requests.

B. Objections to United's Proposed Protective Order

1. The Department's Comments

The Department's December 1, 1995 comments identified several changes to United's Proposed Protective Order that the Department deemed necessary to ensure that the Protective Order was workable and consistent with Minnesota law.

After United adopted Frontier's Revised Proposed Protective Order, the Department indicated that its concerns had been met.

2. AT&T's Comments

AT&T objected to United's attempt to establish in the Protective Order several categories of information that the Company would not be required to provide to a non-governmental party. AT&T asserted that the categories were overly broad and subject to various interpretations.

C. Comments Regarding a Protective Order Drafted by Staff

Prior to the December 12, 1995 hearing on this matter, Staff provided parties with a document containing draft terms for a Protective Order. The draft terms were based on the PROTECTIVE

¹ In the Matter of a Petition by United Telephone Company of Minnesota Requesting Adoption of An Alternative Regulation Plan, P-430/AR-95-1049, ORDER FINDING INITIAL AFOR FILING ADEQUATE (December 19, 1995).

ORDER issued in U S West Communications, Inc.'s (USWC's) Incentive Plan, Protective Orders issued by the Office of Administrative Hearings (OAH) and comments received from interested persons in this case. The commenters were in general agreement regarding the Staff draft. However, two issues merit discussion.

1. Treatment of Confidential Information

AT&T objected to the following provision contained in the Staff draft:

6. Treatment of Confidential Information. Those persons authorized in paragraphs 2 or 5 who request disclosure of the Confidential Information shall be furnished ***one (1) numbered copy*** of the Confidential Information. Except as needed for the purpose of including in affidavits, briefs, or exhibits and then only under seal, ***no Confidential Information shall be copied*** or duplicated in any way, or entered into, incorporated into, or stored in any computer, electronic or magnetic data base or record of the requesting party or its representatives authorized to receive Confidential Information under paragraphs 2 or 5. (Emphasis added.)

AT&T stated that restricting it to one numbered copy and forbidding it to make additional copies was unreasonable because it has several employees in different locations working on some issues.

United clarified that the provision was aimed at restricting the number of copies of confidential material available in competitors' work sites where persons with limited sensitivity to the obligation to treat the information as confidential could have access to it.

The Company indicated some limited flexibility on the number of numbered copies it could provide but no flexibility at all on the prohibition against copying. The Company explained that this approach would provide greater assurance that at the end of the docket the return or destruction process (term 10) would achieve its intended goal.

AT&T stated that, after a more detailed examination of its work load needs, it could adequately conduct its review of United's confidential materials with three (3) numbered copies and accept the prohibition against making copies. MCI indicated that it could manage its review with only two (2) copies. MCI also did not object to the prohibition against making copies.

The Commission has weighed United's valid concern for reasonable protection of its proprietary information along with the companies' needs to efficiently and effectively review these materials so that it can participate constructively in this matter. The Commission has resolved the issue by amending the provision regarding Treatment of Confidential Information as it appears below: term 6.

2. Restriction of Access to Certain Information

In its December 11, 1995 filing, United adopted Frontier's Revised Proposed Protective Order as its own. In Paragraph 2 of that Revised Proposed Protective Order, the Company sought to establish certain categories of information that would be, by terms of the Protective Order, not discoverable. The draft Protective Order prepared by Commission Staff did not include this language.

AT&T supported the Staff draft in this respect. AT&T argued that the Company's proposed categories were properly deleted because they were over-broad. AT&T asserted that the Company's effort to limit discovery in advance was cumbersome and unworkable. AT&T objected that United's proposed language established the Company as the gatekeeper, at least initially, for the discovery of such material.

The Commission is not inclined to attempt to set limits on the scope of discovery in the Protective Order itself. The Commission is not persuaded that adoption of the categories proposed by United would significantly reduce actual discovery disputes between the parties. The Commission believes that, as in the past, most if not all discovery disputes will be resolved informally between the parties through discussion. Where disputes are not so resolved, the party seeking provision of information that the other denies is properly subject to discovery can bring that dispute to the Commission for resolution.

PROTECTIVE ORDER

1. The Commission hereby adopts the following terms to govern the provision of Confidential Information in the discovery phase of this matter:

1. Scope. All documents, data, information, studies, materials or other matters furnished during the course of this proceeding and in connection with the determination of the issues presented in this matter that are proprietary or trade secret (Confidential Information) shall be identified as such and furnished pursuant to the terms of this Order. Such information shall be treated by all persons afforded access to it as proprietary or trade secret information. Confidential Information shall neither be used nor disclosed by any interested person, other than the Department of Public Service or by the Public Utilities Commission (Government Agencies), except for purposes of this proceeding and solely in accordance with this Order or any further Orders amending this Order. The Government Agencies may use Confidential Information obtained in this proceeding to discharge any regulatory duty imposed on them by law, provided that the use of any Confidential Information shall be governed by this Order and, when not inconsistent with this Order, the Commission's Notice of Amended Internal Procedures for Handling Trade Secret Information, **Attachment A**.

2. Persons Allowed Access. Except as otherwise provided with respect to *bona fide* employees of the Government Agencies, only those persons described below who have been identified and who have executed a Protective Agreement, **Attachment B**, may

have access to any Confidential Information. Access to Confidential Information is limited to the following persons: an interested person's attorney, its technical staff persons who must have access to the Confidential Information in order to evaluate matters under consideration in this proceeding, and its Outside Expert Witness or Witnesses. Outside Expert Witness means a person hired by a party to analyze data, testimony or records or to present testimony in connection with this proceeding.

3. Restrictions on Disclosure. Persons authorized to review Confidential Information under this Order shall be individually identified to the interested person producing Confidential Information prior to its disclosure. Prior to disclosure, each authorized representative of the person seeking review of such information shall execute a written Protective Agreement in the form attached to this Order as Attachment B, whereby, he or she shall agree to fully comply with and be bound by the terms of this Order. The person seeking review shall, at or before the time he or she receives Confidential Information, deliver to the party furnishing Confidential Information a copy of such Protective Agreement(s). The Protective Agreement(s) shall show each signatory's full name, permanent address, and employer. Executed Protective Agreements must be filed with the Executive Secretary of the Commission. Paragraph 4 of this Order instead of this Paragraph 3 applies to the Government Agencies.

4. Government Agencies. The Government Agencies have established procedures to protect Confidential Information pursuant to Minn. Stat. §13.03, subd. 2 (1994), the Government Data Practices Act. *Bona fide* employees of those agencies and their legal counsel need not execute the protective agreement form, but shall comply with the Notice of Amended Internal Procedures for Handling Trade Secret Information, Attachment A. If any provision of this Order is in conflict with the Amended Internal Procedure, *bona fide* employees of the Government Agencies shall comply with this Order rather than the Amended internal Procedures. No employee of the Government Agencies shall disclose any Confidential Information to any independent consultant who is not a *bona fide* employee of the Government Agency until the consultant has first executed a Protective Agreement, and served the Protective Agreement upon the interested person(s) providing the Confidential Information and the Executive Secretary of the Commission. Prior to the termination of the consultant's contract, the consultant shall return all copies of Confidential Information to the Government Agency employing the consultant.

5. Exceptions. Interested persons may agree to exceptions to the prohibition on disclosure of Confidential Information to persons not described in paragraph 2. Exceptions shall be in writing, signed by the interested persons' attorneys and filed with the Commission. The exceptions shall state the names and addresses of any persons not described in paragraph 2 who may examine Confidential Information. All persons covered by these mutually agreed to exceptions must agree to be subject to all terms, conditions and restrictions of this Order, and shall execute copies of the Protective Agreement. If the interested persons are not able to agree upon an exception to the prohibitions in paragraph 2, the requesting interested person may move the Commission

for an Order granting the exception as between the interested persons only and as to specific information. Any person authorized to review Confidential Information as the result of an Order from the Commission shall be subject to all terms, conditions and restrictions of this Order, and shall execute a copy of the Protective Agreement and shall file it with the Executive Secretary of the Commission.

6. Treatment of Confidential Information. Those persons authorized in paragraphs 2 or 5 who request disclosure of the Confidential Information shall be furnished a number of copies of the Confidential Information to be determined by the Company and the requesting party but not to exceed three (3). Except as needed for the purpose of including in affidavits, briefs, or exhibits and then only under seal, no Confidential Information shall be copied or duplicated in any way, or entered into, incorporated into, or stored in any computer, electronic or magnetic data base or record of the requesting party or its representatives authorized to receive Confidential Information under paragraphs 2 or 5.

7. Public Pleadings, Hearings, Etc. To the extent any reference is made to any Confidential Information by counsel or persons afforded access thereto during any aspect of this proceeding, including but not limited to, motions, briefs, arguments, direct testimony, cross-examination, rebuttal, and proposed offerings of proof, any public reference to Confidential Information should either be solely by title or its exhibit reference, or in such manner as to not disclose the Confidential Information. Any public reference to Confidential Information by counsel or persons afforded access to Confidential Information during any aspect of this proceeding shall be solely in such a manner as to not disclose the Confidential Information, or shall be given solely to persons who are entitled to receive Confidential Information. Pursuant to normal Commission practice, sufficient notice shall be given prior to oral presentation or discussion of Confidential Information to clear the hearing room of persons who are not entitled to receive Confidential Information pursuant to this Order. "Public reference" means a reference that is not to be placed in the sealed portion of the record. That part of the record of this proceeding which contains Confidential Information, including all exhibits, writings and the like, shall be sealed for all purposes other than as may be further ordered by the Commission .

8. Prohibitions. Except as provided in Paragraph 1, all persons who are afforded access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for business, commercial or competitive purpose or for any purpose other than the purpose of preparation for and conduct of this proceeding, or any administrative or judicial review of this proceedings, and then solely as contemplated by this Order, and shall keep the Confidential Information secure in accordance with the purpose and intent of this Order.

9. Challenges. The persons affected by the terms of this Order retain the right to question and to challenge any claim of a party furnishing documents, data, information, studies, materials or other matters, that such matters contain Confidential Information. If

the persons are unable to resolve a request to disclose Confidential Information, the person from whom disclosure is sought shall either comply with the disclosure request or, by motion, request that the Commission make a determination as to whether the data, information, studies or other materials constitute Confidential Information governed by this Order. A Government Agency which has voluntarily treated the subject matter of a disclosure as Confidential Information may, at any time during the pendency of the proceeding before the Commission, request by motion that the Commission make a determination as to whether the subject matter of the disclosure constitutes Confidential Information governed by this Order. During the pendency of a motion and until otherwise ordered by the Commission, the Government Agency shall continue to treat the subject of the disclosure as Confidential Information. The burden of proving that the subject of a disclosure request constitutes Confidential Information shall be upon the party making the claim that the information is confidential. Any party aggrieved by an Order of the Commission regarding disclosure or the treatment of the subject matter of the disclosure as Confidential Information may seek appropriate relief against such Order.

10. Return or Destruction. Upon the completion of this proceeding, including any administrative or other review, each copy of Confidential Information and all notes, records, calculations, data, documents, analysis or other things relating to or containing any Confidential Information made available under the terms of this Order shall either be returned to the disclosing entity or destroyed by each person who has signed a Protective Agreement. The Department may retain one copy of all documents for its records consistent with the provisions of the Data Practices Act and its duty as official repository of Commission records.

11. Confirming of Return. Upon completion of this proceeding, including any administrative or other review, each interested person who provided Confidential Information, except the Government Agencies, shall confirm and certify by letter to the discovering person that all copies of Confidential Information have been returned and that all notes, records, calculations, data, documents, analysis or other things relating to or containing any Confidential Information have either been destroyed or have been returned to the interested person providing the Confidential Information. The Government Agencies may make such other use of Confidential Information obtained in this proceeding as is provided in Paragraph 1.

12. Designating Confidential Information. Each interested person shall adequately identify its Confidential Information by providing a descriptive cover letter or page indicating that Confidential Information is being provided and by stamping each page or each record with an appropriate notice indicating the confidential nature of the material. If Confidential Information is filed as exhibits or in affidavits or briefs in this proceeding, the filing interested person shall segregate the Confidential Information from the other documents it files. If a brief, pleading or similar filing contains Confidential Information, six (6) copies of the proprietary version of such document must be filed with the Commission.

13. Statutory Standards. Confidential Information supplied to the Government Agencies is subject to the provisions of this Order and to the Notice of Amended Internal Procedures for Handling Trade Secret Information insofar as the same is not inconsistent with this Order and with the Minnesota Government Data Practices Act, Minn. Stat. §13.01 et seq.

2. This Protective Order shall become effective immediately

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-1200 (TDD/TTY) or 1 (800) 657-3782.

ATTACHMENT A

NOTICE OF AMENDED INTERNAL PROCEDURES FOR HANDLING TRADE SECRET INFORMATION

The Minnesota Public Utilities Commission (“Commission”) and the Minnesota Department of Public Service (“Department”) (collectively “state agencies”) have become aware that some problems exist in the collection, storage and use of data pertaining to telephone and utility rate filings in circumstances where the service may be subject to competition. Utilities and telephone companies are under a statutory obligation to supply the information from their books and records to support their rates and regulations. However, the state agencies are understanding of the needs of these companies in certain circumstances to maintain the confidentiality of cost and marketing information in competitive situations.

For these reasons, the responsible authorities in each of the state agencies have reviewed their internal procedures for handling competitive data. First, the responsible authorities note that data which contains economic information of value to competitors is classified as “Trade Secret” information under the Minnesota Data Practices Act (“Act”), Minn. Stat. § 13.37. The Act establishes standards for making a determination whether the trade secret determination applies to the particular data. These standards recognize the efforts of the supplier of the data to maintain its secrecy and the fact that the data has independent economic value from not being known to other persons.

The state agencies are obligated to treat “trade secret” data as nonpublic data under that Act and the responsible authorities in the agency must deny access to that information to other persons. However, the responsible authorities are aware that the procedures under which the data will be handled are not clearly spelled out in the Act. The state agencies believe that the

telephone companies and utilities can be more responsive to requests for the data if the state agencies' internal procedures for handling the data are more clearly spelled out and made known to the public.

The responsible authorities of the state agencies have adopted the following procedures for handling nonpublic data filed with them:

1. All documents, data, studies and other information provided to the state agencies which the telephone company or utility regards as Trade Secret information should be stamped "Trade Secret Information--Not for Public Disclosure". The marking must appear on each page considered proprietary. When pages other than the first page of filed material contains trade secret information, the cover letter or first page must state the trade secret information is continued within. Only one copy of such information need be filed.
2. Information marked "Trade Secret" shall be treated by the state agencies, their staffs and consultants hired by the state agencies (collectively "authorized individuals") afforded access to this information as constituting proprietary, confidential and privileged commercial and financial information. This information shall neither be used nor disclosed except as hereinafter described. All persons authorized to access proprietary material will be given a copy of this notice.
3. Access to "Trade Secret" information shall be limited to authorized individuals. Access shall be solely for the purpose of reviewing the tariff or other filing or conducting an investigation of the telephone company or utility. The material may be made available to consultants hired by the state agencies only after that consultant has signed a nondisclosure agreement and a copy of the signed agreement is provided to the telephone company or utility. Such consultants have that status of independent contractors. The state agencies will not be held responsible for the actions of such independent contractors with regard to the nondisclosure agreement, if such independent contractors have signed the agreement required by this paragraph.

4. All “Trade Secret” information filed in this manner will be stored in locked file cabinets under the control of the respective responsible authority of each state agency. A control sheet identifying those individuals who are authorized to access the information will be attached.
5. The information marked “Trade Secret” may be transferred in whole or in part to a data processing facility operated by one of the state agencies identified, provided that the information can be accessed only by a protective code known only to the authorized individuals who are assigned to review the relevant filing.
6. No copying of the “Trade Secret” information will be allowed, except that the Commission and the Department each may be allowed to produce one copy for use during their review of the filing. Copies shall be destroyed at the conclusion of the case.
7. In the event that the tariff or other matter in which the “Trade Secret” information is filed becomes the subject of a contested case or rulemaking hearing before the Office of Administrative Hearings, the trade secret information shall not be discussed or its contents disclosed or introduced into evidence except in accord with procedures adopted by the presiding Administrative Law Judge for the handling of proprietary information or trade secrets.
8. The Commission will discuss “Trade Secret” information, when necessary, in a meeting closed to the public pursuant to Minn. Stat. § 14.60.
9. When a state agency receives a request for the data from an outside party, it will notify the supplier of the data of the request for the data. If the supplier believes that the information marked “Trade Secret” continues to be so classified, it shall file with the state agency a verified affidavit stating the grounds for claiming continued nonpublic status. The state agency will review the telephone company’s or utility’s affidavit and determine whether release of the data is required under Minn. Stat. § 13.03, subd. 3. If the information is classified as nonpublic data, the state agency will inform the requesting person of this status, and deny the request for access. If the information is classified as public, the state agency will notify the parties of this status and will make the material available to the requesting person on the tenth day a notice is given.

10. When the case file is closed, the material will be retained by the state agency as required by the Official Records Act, Minn. Stat. § 138.163, et seq., and will continue to be treated as proprietary material.

Dated: October 16, 1985

ATTACHMENT “B”

In the Matter of Petition by United Telephone
Company of Minnesota Requesting Adoption
of an Alternative Regulation Plan

Docket No. P-P-430/AR-95-1049

PROTECTIVE AGREEMENT

I have been presented with a copy of the Protective Order issued by the Minnesota Public Utilities Commission in the above-captioned case. I have read that Order and agree to be bound by the terms of that Order. I hereby certify that my reason for requesting and receiving Confidential Information is to assist in the evaluation of said Plan.

I have requested review of the Confidential Information on behalf of:

(Company Name - Please Print)

Signature of Person Requesting
Review of Confidential Information

Name (Please Print)

Title

Address

Telephone